

Nouri (Migration) [2021] AATA 3742 (29 September 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Mohammad Kazem Nouri
VISA APPLICANT:	Ms Marzia Rezai
CASE NUMBER:	1827332
DIBP REFERENCE(S):	BCC2017/2117524
MEMBER:	Meredith Jackson
DATE:	29 September 2021
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations

Statement made on 29 September 2021 at 6:55pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine relationship – marriage not legally registered – de facto relationship unlikely in cultural context and less than 12 months in any case – valid marriage certificate provided to tribunal – limited evidence of financial, household and social aspects of relationship while living in separate countries – extreme civil unrest in visa applicant’s home country and COVID-19 travel restrictions – nature of commitment – review applicant’s health and visa applicant’s safety – relationship now 5 years’ duration – credibility – decision under review affirmed

LEGISLATION

*Migration Act 1958 (Cth), ss 5CB, 5F(2)(a), 65
Migration Regulations 1994 (Cth), rr 1.15A(3), 2.03A, Schedule 2, cls 309.211(2), 309.221*

CASES

Bretag v MILGEA [1991] FCA 582
He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 6 September 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 13 June 2017 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied that the applicant met the definition of spouse or de facto partner as defined in the Act and Regulations. Reasons provided by the delegate included that evidence given that the parties were married on 30 September 2016 in Afghanistan was not sufficient to confirm that the marriage was legally valid; and the alternative, that the parties were in a de facto relationship, was extremely unlikely in the cultural context.
4. The review applicant was represented in relation to the review by his registered migration agent.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

6. Background

7. The visa applicant is Marzia Rezai, a 32 year old national of Afghanistan who lives in Kabul. She declares no previous marriages and states she was introduced to the sponsor by an aunt, and that she met him in person in September 2016. The review applicant and sponsor is Mohammad Kazem Nouri, a 50 year old Australian citizen whose divorce from his former wife was finalised by the Federal Circuit Court of Australia on 29 July 2016. The applicant and sponsor claim they met that year, through an aunt of the applicant and then in person in Kabul on 15 September 2016. They were married on 30 September 2016, calculated to 2 October 2016 in formal documentation issued later by an Afghani court. The delegate found in the primary decision of 6 September 2018, that the marriage was not registered formally and legally with the Afghani government and therefore was not valid. The delegate then considered whether the parties met the additional criteria for a de facto relationship but found the relationship period was of insufficient duration because in a cultural context, the relationship was extremely unlikely to have commenced prior to the parties' wedding.
8. On 10 December 2018, a formal Marriage Certificate was issued by Afghani authorities and provided to the Tribunal in support of the review. It states that on 2 October 2016 the parties were married "at home".

9. The primary decision

10. The visa applicant was refused the visa on the basis that she did not satisfy cl.309.211(2) because the delegate was not satisfied she was the spouse or de facto partner of the sponsor. The delegate was not satisfied that the parties' marriage was registered with an

appropriate authority in Afghanistan and as a result, found the parties did not meet the requirement of a valid marriage under Section 5F of the Act. The delegate then considered whether the visa applicant met the requirements for a de facto partner, and in the decision, referred to the four-part test to ascertain whether the parties' relationship was a de facto relationship as defined. It considered the additional requirements for a de facto relationship in Regulation 2.03A, which provides that the Minister must be satisfied that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application. The delegate found that at the time of the application, the parties did not meet Regulation 2.03A. The delegate noted that the parties had both declared in relation to the visa application that they committed to a shared life together on 30 September 2016. The delegate observed that for cultural reasons in Afghanistan, a de facto relationship is extremely unlikely to commence prior to marriage, and therefore, because the application was lodged on 13 June 2017, the relationship was only in existence for a period of less than 10 months prior to lodgement. The delegate found that the relationship is incapable of being recognised as a de facto relationship as defined under section 5CB of the Act.

11. The review applicant claims he provided the marriage certificate to the Department in January 2019. He provided a copy to the Tribunal on 14 January 2019. The marriage certificate, therefore, is new information that was not before the delegate at the time of the primary decision. The Tribunal notes the formal marriage certification calculates the date of the marriage as 2 October 2016, whereas the parties claimed they committed on 30 September 2016. The Tribunal has considered the discrepancy and finds it of no consequence given the differences in civil calendars of Afghanistan and Australia.

ISSUES AND LAW

12. There is a two stage process for Partner visas. An applicant must first hold a provisional visa, enabling them to remain in Australia on a temporary basis, prior to the grant of a permanent visa. The grant of a permanent visa would generally depend on whether the relationship has continued for a period of at least two years. The Tribunal is considering the first, provisional stage.
13. The issue in the present case is whether at the time of application and at the time of this decision, the applicant is the spouse or de facto partner of the sponsor.

Whether the parties are in a spouse or de facto relationship

14. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters

contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

16. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. On 14 January 2019, the review applicant provided the Tribunal with a Marriage Certificate and attendant documentation issued on 10 December 2018 by the High Court of the Islamic Republic of Afghanistan, certifying that the parties were married on 2 October 2016. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

17. In forming a view of the relationship's status, the Tribunal has considered the evidence before it regarding each matter in r.1.15A(3)(a), (b), (c) and (d). The Tribunal finds as follows.

18. *Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.*

19. The parties have been living in separate countries since their marriage in October 2016. Ms Rezai has never visited Australia.
20. Ms Rezai, in a statement provided with the visa application, refers to her occupation as a teacher. Mr Nouri is affected by severe health conditions and has provided no information about the source of any income.
21. The Tribunal acknowledges that in the parties' particular circumstances of living in separate countries, with Afghanistan experiencing extreme civil unrest, it is very difficult for the parties to provide cogent evidence of shared ownership of assets or legal obligations owed to the other. There is, however, some evidence before the Tribunal concerning the pooling of financial resources and sharing of day-to-day household expenses. Mr Nouri provided a statement from Aliexpress Group Pty Ltd, dated 9 September 2021, showing a number of payments made to Ms Rezai: four funds transfers totalling \$1,642 between 3 March 2021 and 9 June 2021. Mr Nouri also provided a statement from World Co Foreign Exchange for transfers totalling \$1,104 to Ms Rezai, made by him between 12 March 2021 to 1 April 2021. An extract provided from what appears to be an earlier Aliexpress Group statement, shows transfers from the sponsor to the visa applicant totalling \$869.73 between 1 February 2018 to 4 March 2017. Mr Nouri also provided a receipt for a jewellery purchase (untranslated and undated), on 4 September 2019 for approximately \$700. The Department file contains information that Mr Nouri paid \$6,932.28 for Ms Rezai's visa application on 13 June 2017. Tribunal records show he was also the payee for the review application fee of \$1,764.
22. The Tribunal finds the financial aspects of the relationship indicate the parties have pooled some of their resources and that Mr Nouri has forwarded funds to Ms Rezai. There is no evidence before the Tribunal concerning any joint ownership of assets, joint liabilities or legal obligations between the parties, and the Tribunal considers such joint arrangements unlikely in their current circumstances. However having considered all the evidence, on balance, the Tribunal affords some weight to the financial aspects of the present matter.
23. *Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.*

24. There are no children of the relationship. Mr Nouri's divorce order indicates there are no children of his previous marriage to whom Section 55A(3) of the *Family Law Act 1975* applies. Mr Nouri has however declared one child, Arezou Nouri, aged 21 years, who provided a Statutory Declaration in support of a joint future household between her father and Ms Rezai, whom she refers to as her stepmother. Ms Nouri states that she lives with her father and grandmother in a house in Browns Plains, and that when her stepmother comes to join them here in Australia, *"there will be 4 of us at the same house. Our town house has 3 bedrooms and we all have our bedroom at present. Once my stepmother comes in, my father and my stepmother will have one bedroom."* Ms Nouri states that whenever she asks her father to come and have dinner, she sees him talking to her stepmother on the phone: *"This shows to me that they are genuinely in love and want to be together and live together"*.
25. For several reasons, the parties have not spent their years as a married couple cohabiting. Ms Rezai has never visited Australia. Mr Nouri has been to Afghanistan twice. The Tribunal acknowledges that establishing a household in their circumstances and proving its nature for the review are all but overwhelming: they face visa-related immigration restrictions that place them in separate parts of the world, COVID-19 travel restrictions that prevent visitation, civil unrest disrupting basic services, and widespread turmoil in Afghanistan that render travel in and out of that country perilous.
26. Departmental information indicates Mr Nouri has visited Afghanistan twice since 2016: the first time, he departed Brisbane on 8 September 2016 and arrived back on 19 October 2016 (covering the period of the parties' marriage and honeymoon); and in the second instance, he departed Brisbane on 15 August 2019 and arrived back on 15 October 2019. In total, this is a period of approximately 13 weeks during which the parties have spent time together in Afghanistan. The Tribunal has considered the timings and accepts the trips were for the purposes of the parties' relationship. The Tribunal notes that visits beyond late 2019 have been extremely difficult due to the effects of the global pandemic, and the civil circumstances in Afghanistan. The Tribunal accepts, however, that Mr Rezai spent significant time in Afghanistan with Ms Rezai prior to that, and that he travelled with her to various sites during their honeymoon, as is depicted in photographs provided to the Tribunal.
27. The Tribunal having considered the evidence relating to the nature of the household, including the sworn statements of Mr Nouri's daughter, Arezou Nouri, affords the nature of the household some weight in the parties' favour.
28. *Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.*
29. In support of the social aspects of the relationship, Mr Nouri provided to the Tribunal photographs of the parties in various settings. They depict the parties at their wedding in the company of (unidentified) guests, in the company of other persons in various settings, and visiting various tourist sites.
30. Mr Nouri provided sworn affidavits in support of the social aspects of the relationship from persons who claim to have known him for years and know of his marriage to Ms Rezai. A Statutory Declaration from Omid Hussaini in support of the relationship states he has known the sponsor for over 20 years as a brother in law, as a member of the same tribe in Afghanistan and through his father's friendship with Ms Rezai's father. Mr Hussaini states he met Ms Rezai in Kabul "about three years ago", and that he and his wife had lunch at her house and were guests at the wedding. He states that Mr Nouri is *"very worried about the safety of his wife in Kabul"* and in desperate need of finding her a way out of the country, particularly, he claims, as her father was an employee of the previous government. Mr Nouri

also provided a statement from Adel Yaqubi who states that he carried a gift from Mr Nouri to Ms Rezai in Afghanistan when he visited in July 2021, but he had missed seeing her. The statement referred to in paragraph [20] above, from Arezou Nouri, the sponsor's daughter, also comments on the nature of the relationship. She states that *"I always see my father either talking on the phone or mess(ag)ing his wife and I can confirm that their relationship is genuine and continuing."* The Tribunal having considered the evidence before it, affords the social aspects some weight.

31. *Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.*

32. Forming a view of the level of commitment within a relationship in any circumstances, generally comes down to credibility as much as how well the parties present their case. In this matter, the parties have provided fairly limited evidence of how the relationship has been conducted on a day-to-day basis, and of how their relationship has developed over its five years, but the evidence which is offered, particularly from the relationship's supporters, is of some quality and depicts a relationship of strong commitment between an Afghani school teacher and an Australian citizen who needs his wife. Evidence from the third parties consistently points to a genuine relationship between the parties. Mr Nouri's daughter Arezou is particularly confident in her expressions of support and acceptance for her stepmother and depicts her father as being in a committed and loving relationship, pursuing a daily habit of communicating with his wife overseas. Others attest to a deep longing, and need, on the part of the sponsor for the parties to be reunited in Australia. The communication records provided for the review are not translated, but they indicate regular contact between the parties. Clearly, given current events at the time of this decision, the applicants do not have the option of seeking to live together in Afghanistan.
33. The Tribunal also notes the relative frequency of requests to the Tribunal to have the case heard. It is clear from some of those requests that Mr Nouri is in part motivated by his own health and care needs, following an accident which left him with significant impairments, and these are supported by medical evidence. Dr Sayed Taqvi of Gold Coast Medical Centre states Mr Nouri is suffering from multiple medical, physical and psychologic conditions that render him dependent on support for his daily living tasks. He states that the sponsor has several chronic conditions and suffers from severe anxiety and low mood. Dr Taqvi writes: *"He has been waiting for his wife's visa for over two years and considering his above mentioned conditions he is in desperate need of support and care ... It is strongly recommended to facilitate his wife's arrival (to help him) and reduce the risk of deterioration and also to save his wife from the dire situation over there."* The Tribunal is satisfied that Mr Nouri wants his wife in Australia for multiple reasons: to provide companionship, join in his care and support him emotionally. However the Tribunal notes he also appears to be motivated by his wife's needs, which are obviously urgent, and he expresses a strong desire to see her leave Afghanistan for the safety of the home that awaits her in Australia.
34. Having considered all the evidence before it, the Tribunal finds it to be generally credible and supportive of a genuine relationship. It substantiates that the relationship has endured for close to five years since the parties met and married, and confirms that in this period, the parties have spent close to three months together. It indicates that Mr Nouri and Ms Rezai remain committed to one another and that their marriage, despite formidable obstacles, is intended for the long term. The parties' statements, and those of persons close to the sponsor, including his 21 year old daughter, indicate that the parties derive a degree of companionship and emotional support from each other and see the relationship as long-term. The Tribunal weighs the nature of the commitment in the parties' favour.

35. Conclusions

36. In making a decision about the relationship, the Tribunal is guided by the authority in *Bretag v MILGEA* [1991] FCA 582, which found that to the extent that later events logically show the existence or non-existence of facts at an earlier time, those later events may be taken into account to show the existence or non-existence of facts at the earlier time. In this matter, it is clear to the Tribunal that the parties were married in 2016, as they claimed, and that the events and circumstances of the relationship since then indicate they have a mutual commitment to shared life to the exclusion of others; a genuine and continuing relationship; and that they do not live separately and apart on a permanent basis.
37. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
38. Therefore the visa applicant meets cl.309.211 and cl.309.221.
39. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

40. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Meredith Jackson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).